Supreme Court, U.S.
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Supreme Court of the United States

MARK BAKER,

Petitioner,

v.

BOOZ ALLEN HAMILTON, INC.,

Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Did the Circuit Court err in making public policy that sexual assault in a harsh far distant foreign work environment is so highly unusual and extraordinary that the Federal Contractor in U.S. headquarters is excused from negligent retention, supervision and hiring liability even when it refused to heed numerous warnings from its on-site Chief of Party supervisor and security officer of the danger of grave bodily injury to her son and others from an employee who became emotionally unfit, explosive and had already committed battery unless the specific sexual assault is foretold?

2. The Circuit Court ignored Maryland lex loci delicti law which applied Kyrgyz law allowing civil litigation independent of criminal prosecution or conviction of the rape of the Chief of Party's eleven year old dependent in Kyrgyzstan under a Federal Contractor's Visa naming itself responsible for the dependent, housed in company paid apartments, schooled in company paid schools and transported to company functions, offices and apartments when the rape was in the company apartment used to allow the unfit employee, responsible for financial coordination with US Headquarters finance office, to be available during US Headquarters business hours eleven hours behind Kyrgyzstan [Kyrgyzstan weekend 7 pm to 3 am Friday night to Saturday morning is US Virginia business day Friday hours 8 am to 4 pm]. Did the Court err and apply the wrong standard of proof of law in rejecting Kyrgyz law which allowed the case and using inappropriate Maryland case law for smoke

detectors as authority that to hold employers liable for their employee's sexual assault without prior acts of sexual assault of which the employer was aware would destroy the foundation of proximate cause.

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PETITTION FOR A WRIT OF CERTIORARI

Mark Baker respectfully petitions for a writ of certiorari to review the judgment of the U.S. Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The court of appeals' opinion (App., infra, A1-16) is not officially reported but is available at 2009 WL 512672 and is reproduced in the Appendix here at A1-16. The district court's order granting respondent's Summary judgment motion (App., Infra, A17—18) is unreported.

BASIS FOR JURISDICTION IN THIS COURT

The court of appeals entered its judgment on December 28, 2009. On January 25, 2010 the court denied a timely petition for rehearing en banc (App., infra, 19-20). On April 22, 2010, the Chief Justice extended the time within which to file this petition until June 24, 2010. Petitioner invokes this Court's jurisdiction under 28 U.S.C. Section 1254(1).

STATUTES, RULES AND REGULATIONS INVOLVED

Fed. R. Civ. P 44.1 Determining Foreign Law

A party who intends to raise an issue about a foreign country's law must give notice by a pleading or other writing. In determining foreign law, the court may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under the Federal Rules of Evidence. The Court's determination must be treated as a ruling on a question of law.

Federal Rule of Appellate Procedure Rule 32.1.

Citing Judicial Dispositions

(a) Citation Permitted. A court may not prohibit or restrict the citation of federal judicial opinions, orders, judgments or other written dispositions that have been:

(i) designated as "unpublished," "not for publication," "non-precedential," "not precedent," or the like; and

(ii) issued on or after January 1, 2007...

Pub. L. No. 111-118, 123 Stat. 3409, 3455, H.R. 3326 (2009)

SEC. 8116(a)(1) and (2) of the Department of Defense Appropriations Act, 2010 making appropriations for fiscal year ending September 30, 2010 Section 8116(a)(1)-(2)

Pub. L. No. 111-118, 123 Stat. 3409, 3455, H.R. 3326 (2009) reads:

> SEC. 8116(a) None of the funds appropriated or otherwise made available by this Act may be expended for any Federal contract for an amount in excess of $1,000,000 that is awarded more than 60 days after the effective date of this Act, unless the contractor agrees not to:
>
> (1) enter into any agreement with any of its employees or independent contractors that requires, as a condition of employment, that the employee or independent contractor agree to resolve through arbitration any claim under title VII of the Civil Rights Act of 1964 or any tort related to or arising **3455* out of sexual assault or harassment, including assault and

> battery, intentional infliction of emotional distress, false imprisonment, or **negligent** hiring, supervision, or **retention**; or
>
> (2) take any action to enforce any provision of an existing agreement with an employee or independent contractor that mandates that the employee or independent contractor resolve through arbitration any claim under title VII of the Civil Rights Act of 1964 or any tort related to or arising out of sexual assault or harassment, including assault and battery, intentional infliction of emotional distress, false imprisonment, or **negligent** hiring, supervision, or **retention**. [Emphasis Added]

Federal Arbitration Act, 9 U.S.C. Section 1 et seq., see Section 3. [FAA]

STATEMENT

This Case involves questions of exceptional importance where the Fourth Circuit Court conflicts with the Fifth Circuit Court that addressed the issue of negligent retention in a rape committed by employees of a large Federal Contractor executing US policy on distant harsh foreign soil where the exact form of danger [rape] was not designated but the out of control status of the employees was reported to U.S. Headquarters by the local supervisor. Jones v. Halliburton, 583 F.3d. 228, 107, September 15, 2009. [Jones]

The Fourth Circuit Court's opinion classifying sexual assault by a company employee as so highly unusual and extraordinary as to break the chain of proximate cause for employer liability not only

conflicts with the Fifth Circuit **Jones** case but also frustrates the intent of Section 8116(a)(1) and (2) U.S. Defense Appropriations Act, 2010, 123 Stat. 3409, 3455, H.R. 3326 (2009) preserving the right to sue Federal [Defense] Contractors for negligent retention, supervision and hiring. The Fifth Circuit Jones Case and the Federal law show a clear trend that sexual assault is sufficiently common in far flung harsh, high stress foreign countries for workers that it is a problem requiring official recognition. This Federal law takes sexual assault out of being considered "so highly unusual and extraordinary" that a Federal Contractor can evade responsibility for failure to responsibly manage its employees on foreign soil.

Further there are questions of the standard of proof and application of foreign law is in disarray as well as facts overlooked leading to ignoring Maryland's lex loci delicti application of law of foreign site of the tort and public policy application of proximate cause in a domestic products liability case Pittway Corp. v. Collins, 409 Md. 218, 238-9, 973 A.2d 771, 783 (June 12, 2009) to protect Federal Contractors from negligent retention liability.

A. **Factual Background**

This case involves the responsibility of the U.S. Federal Contractor employer headquartered in the Washington Metro area in Virginia for its employee's sexual assault in 1996 of the eleven year old son of his on site in Kyrgyzstan supervisor who was the Chief of Party of the State Department US Agency for International Development (US AID) project for Bankruptcy in Kyrgyzstan and Kazakhstan.

Kyrgyzstan, a former Soviet Union Republic, is presently the staging area of the Afghanistan War and the country has undergone instability and revolutions since the fall of the Soviet Union in 1991. Sexual assault was committed on the child by the Booz Allen employee whom his supervisor had reported as having become dangerously unfit. It occurred in the apartment paid for by Booz Allen for him as their financial officer for the US AID Project in Kyrgyzstan. His duties required him to confer with Virginia Headquarters during business hours of the Headquarters for project financial management. Kyrgyzstan is 11 hours ahead of the Virginia Headquarters. Kyrgyzstan weekend Friday night from 8 pm to 4 am Saturday is Friday business day in Virginia 9 am to 5 pm.

B. Proceedings in District Court

Petitioner filed the Baker v Booz Allen case in Maryland Circuit Court for Montgomery County [6th Circuit CV #268125] within three years of Petitioner turning 18 in 2006. Respondent removed it to the U.S. District Court of Maryland [Baker v. Booz Allen Hamilton, 4/06/06 08:06-CV-00889RWT unreported, Order of D. Ct. Md App. A-17]. The US District Judge Roger Titus granted summary judgment. He determined that Maryland law applied requiring Maryland conflict of law rule lex loci delicti to be applied making Kyrgyz law the law that determined whether a case could be filed and relief was available.

Key to this Decision was a Declaration (A40-43) Defendant filed without producing the laws cited stating that Plaintiff could not file a civil case unless the Booz Allen Employee who molested Plaintiff had first been convicted criminally of buggery and Booz Allen had ordered the employee to molest the Plaintiff who was then an 11 year old child[1]. A40-43. The District Court accepted the Declaration and ruled that Petitioner was barred from bringing a case in Kyrgyzstan. Then, just in case Kyrgyz law did apply, decided Maryland law and Virginia law would not allow the case. (A25-27)

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[1] Defendant's two page Declaration without copies of the law cited opined that Plaintiff could not file civilly in Kyrgyzstan because he had not first obtained a criminal conviction for buggery against the employee and the employer Booz Allen had not specifically told the employee to molest the eleven year old child. A40-43. Upon questioning Defense Counsel assured Judge Titus, he understood that Kyrgyz law only allowed strict respondent superior liability. A21-22 The Declaration cited but did not provide copies of the Kyrgyz Soviet Socialist Republic Civil and Criminal 1960s laws emanating from the former Soviet Union 1936 Constitution and 1999 civil and criminal procedural law cited as Kyrgyz authority. After a year-long search Plaintiff located and produced to the Circuit Court copies of the Defendant cited Kyrgyz laws A32-35 plus pertinent parts of the applicable USSR Constitution A36-38, Learned Treatise A38-40 and Authentication Letter from the Library of Congress, Assistant Dir Legal Research, Chief Eastern Law Division A35-36. The actual laws showed that not only was plaintiff allowed to file a complaint without a conviction for buggery against the Booz Allen Employee, but that Plaintiff, even as a child had a right to sue on his own and the employer organization was responsible for the management of the enterprise including the picking, retaining and supervising of employees who went a field of their duties. A32-40

C. Proceedings in Court of Appeals

Plaintiff appealed the Summary Judgment. After long search Petitioner located and produced the actual laws cited in the incorrect Declaration showing that Plaintiff: could sue in Kyrgyzstan for sexual assault; had a separate right against Booz Allen [even though he was a child then] and Booz Allen as part of their management of their business was responsible for negligent retention of employees who do harm. Kyrgyz law, infra A32-40. Further, the issue of whether the employee action was within the scope of responsibility was a question of fact that relied on factors such as those present in this case that it was committed in apartments paid for by Booz Allen for company availability during Virginia Headquarters business hours. See Addendum, Infra A32-40 for Kyrgyz law and Learned Treatise by Professor Christopher Osakwe A38-40[2]. The unfit employee in his BAH apartment on Friday night in Kyrgyzstan was available to Virginia Headquarters as the on-site financial officer in Kyrgyzstan during Virginia business hours on Friday when the molestation occurred. Defendant appealed the Trial Court's denial of Defendant's motion for sanction. In affirming the District Court, the Circuit Court considered and reasoned.

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[2] Professor Osakwe trained in Russia and he has taught in U.S. law schools, he was Special Counsel to the Kyrgyz Republic President in 1995 funded by the World Bank, Head of US AID in Kazakhstan 1996, and has been Professor of Law at Moscow State University.

> Baker presented evidence that Davenport was far from a model employee, one capable of committing deplorable acts, including slapping employees. Given his propensity for slapping employees and committing other unruly acts in the workplace, it was not objectively unreasonable for Baker to claim that Davenport suffered from emotional disorders and that said disorders proximately caused the sexual assault of Baker. [emphasis] A-15

However, the Court decided,

> In our view, the injury in this case (sexual assault) simply was not a reasonably foreseeable injury arising from the alleged negligent hiring, retention, and/or supervision of Davenport [the unfit employee].... BAH could not reasonably anticipate that Davenport's behavior was an inevitable prelude to sexual assault if his actions did not clearly and unmistakably threaten particular criminal activity that would have put a reasonable employer on notice of an imminent risk of harm to a victim...Such a holding would undoubtedly tear the concept of proximate cause from its moorings... A13

This in essence gives Federal Contractors a standard 'license to slap' battery and at what time does licensed slapping battery graduate to employer responsibility. Does it require that the Federal Contractor hire a convicted sexual assailant felon before it is responsible? Does the Federal Contractor get one free sexual assault pass per employee before

it becomes responsible? Here the Fourth Circuit is in conflict with Federal law and the Fifth Circuit which allowed litigation for sexual assault against a Federal Contractor without the prerequisite of hiring a convicted sexual assault felon and previous occurrences of rape on their company premises.

In the *Baker v BAH* case, the dangerous employee's supervisor on-site in the harsh foreign environment did not ask Washington to fire the employee but informed Washington that he was unfit and needed to be removed back to the U.S. before he gravely injured someone. The on-site supervisor specified herself and her 11 year old son as in the gravest danger. The employee had already committed battery and threatened her son that he was going to get him. The Federal Contractor's Virginia Headquarters discursively dismissed the on-site supervisor's warnings as unimportant because it did not involve something important, like theft and did not even investigate. A22-24

The Fourth Circuit affirmed the Trial Court in both appeals in an unpublished opinion. Infra at A1-16. The Circuit Court upheld the Trial Court grant of Summary Judgment but unlike the Trial Court, held that Maryland not Kyrgyz law applied to deny Plaintiff a right to sue. The Circuit Court cited authority of a Maryland smoke-detector case decided after the Fourth Circuit Court briefing of the Baker v Booze Allen Hamilton, Inc., case was finished. Pittway Corp. v. Collins, 973 A.2d 771, 787 (Md.

2009). Neither the Fourth Circuit Court Judges nor the Plaintiff or Defendant mentioned the smoke detector case in oral argument or briefing. Plaintiff believes, the Fourth Circuit Court per curium opinion improperly cited the smoke detector case as authority to hold that sexual assault is so extraordinary and unforeseeable, that a company should not be held responsible for notice of an employee's capability of committing sexual assault based upon warnings of the employee's supervisor in Kyrgyzstan (a faraway country that it is day when it is night in the Booz Allen Washington Headquarters) and instances of the subordinate's commissions of battery because to do so would tear asunder the fabric of proximate cause. Id. at A13

Plaintiff filed Petition for Rehearing en banc citing the conflicting decision in the **Jamie Lee Jones** case in the U.S. Fifth Circuit Court of Appeal which affirmed the Trial Court finding that rather than being a highly extraordinary and unusual occurrence, sexual assault is an important issue when it is perpetrated by company employees in far distant stressful work assignment lands. It is so important that its ability to be litigated is favored even over the strong federal preference for arbitration sought by Defendants in the Fifth Circuit Jones v Halliburton Case. The **Jones** case involved the liability of KBR Headquartered in the US for the rape by its employees of a young KBR employee in IRAQ. KBR had received numerous reports that the work environment and living quarters was out of

hand and dangerous. The injured KBR employee had signed as a condition of employment, an agreement to arbitrate all aspects of the employment. Thus, although a number of issues involving the rape of the young KBR employee in IRAQ in the Fifth Circuit case were kept under the auspices of the strong federal preference for arbitration, the issues of negligent retention, hiring and supervision responsibility of the employer of employees who commit sexual assault battery were carved out of the Federal Arbitration Act strong arbitration preference. Jones v. Halliburton, 583 F.3d. 228, 107, September 15, 2009.

Before the Fourth Circuit decided the appeal of *Mark Baker v Booz Allen, Inc.,* the U.S. Congress passed a law providing that among other issues, specific litigation rights for negligent retention, supervision and hiring for sexual assault could not be denied in the employment contract. U.S. Public Law [PL] 111-118 Department of Defense Appropriations Act for 2010, 123 Stat. 3409, 3455, making appropriations for fiscal year ending September 30, 2010. The clear trend is official recognition that sexual assault is sufficiently common in harsh, high stress, difficult foreign work areas that the U.S. Congress officially recognized it as a problem and thus it is not a highly unusual extraordinary occurrence that breaks the chain of proximate cause. Therefore to hold in the Baker Case that sexual battery cannot be pursued by a victim in the case of US citizens in far distant

countries who are harmed by other US citizen employees of US companies is in total opposition to the US Law passed and would frustrate the purpose of its enactment. As a consequence, the Fourth Circuit Court erred in deciding as a matter of public policy that to hold the employer in such circumstances liable would tear asunder the fabric of proximate cause.

REASONS FOR GRANTING THE PETITION

I. The Court should grant the petition because the U.S. 4th Circuit decision is in opposition to Federal law favoring the right to sue a Federal Contractor employer for negligent retention of employees who committed sexual assault.

Federal legislation renders inappropriate the Fourth Circuit's public policy decision that sexual assault abroad by employees in harsh foreign environments working for Washington DC headquartered Federal Contractors is so unusual and extraordinary as to break the chain of proximate cause for employer liability for negligent retention, supervision and hiring. The Federal legislation clearly shows that sexual assault caused by employer negligent retention, supervision and hiring is common enough to merit specific legislation. An amendment to the Department of Defense Appropriations Act, known as the Franken Amendment Pub. L. No. 111-118, 123 Stat. 3409, 3455, H.R. 3326 (2009), infra STATUTES SECTION 8116(a)(1) and (2) precludes Federal contractors that accept 2010 Defense Appropriation funds over $1,000,000 from entering or taking any action to enforce any provision of an existing or prospective:

"agreement with an employee or independent contractor that mandates that the employee or independent contractor resolve through arbitration any claim under Title VII of the Civil Rights Act of 1964 or any tort related to or arising out of sexual assault or harassment, including assault and battery, intentional infliction of emotional distress, false imprisonment, or negligent hiring, supervision, or retention". Dep't of Defense Appropriations Act, 2010, Pub. L. No. 111-118, 123 Stat. 3409, 3455, H.R. 3326, Section 8116(a)(1) and (2) (2009), infra at STATUTES.

In Pub L. No. 111-118, 123 Stat. 3409, 3455, H.R. 3326 (2009), the U.S. Congress Senate Military Appropriations Bill carved out an exception to the usual Federal preference to uphold contracts to arbitrate for the benefit of the right to sue an employer for negligent retention, supervision and hiring in the sexual battery by its employee, It came to be in response to the U.S. Fifth Circuit Court Case which while holding an arbitration clause binding for an employee against an employer whose employees committed sexual battery in a far distant, stressful and harsh work environment on U.S. business carved out a right to litigate the employer's negligent retention, supervisions and hiring for its employees sexual battery.

This Court reviews judgments in light of the "law as it now stands, not as it stood when the judgment below was entered", Diffenderfer v. Cent. Baptist Church of Miami, Fla., Inc., 404 U.S. 412, 414 (1972) (finding appeal moot because state legislature, during pendency of appeal, repealed the statute petitioner contended was unconstitutional.)

The Franken Amendment shows Federal policy that employer negligent retention, supervision and hiring liability for employee sexual assault in harsh foreign workplaces is a sufficiently common problem that it must be specifically provided for in U.S. legislation. Thus, it is not the uncommon occurrence from which public policy demands the Fourth Circuit protect Federal Contractors headquartered in Washington DC.

A. The Fourth Circuit Court used a Maryland smoke detector case as authority to deem sexual assault so extraordinary and unforeseeable that it broke the thread of proximate cause as a matter of public policy.

The U.S. Fourth Circuit held in the case sub judice that to hold a U.S. Headquartered company responsible for the sexual battery of its employee on his supervisor's eleven year old son even though his on-site supervisor in Kyrgyzstan had warned US Headquarters of the battery the employee had already committed and his worsening emotional state would tear asunder the foundation of proximate cause because sexual battery was so unusual. The Court cited as authority for its finding a case involving a smoke detector located in a house that had been resold several times which neither the Court nor the Parties discussed in oral argument and which came out after briefing was finished. We believe the Fourth Circuit Court erred in its decision.

The Fourth Circuit opinion cited a Maryland products liability case for a smoke detector failure in a house that had transferred ownership a number of times decided after briefing and oral argument and

not discussed in either to make a policy decision that sexual battery. The Court used the Pittway case as authority for its public policy decision that sexual assault was so extraordinary and unforeseeable that even though the employee had committed battery that his on-site supervisor in Kyrgyzstan had reported to Virginia HQ, it would tear asunder the foundations of proximate cause to hold the Virginia HQ Federal Contractors responsible for their employee's sexual battery against his supervisor's 11 year old son. This U.S. 4th Circuit Court made public policy decision frustrates the intent of Federal Law that specifically preserves Federal Contractor liability for negligent retention, supervision, and hiring of employees that cause injury to others in far distant, harsh environments outside the U.S.

B. **Federal Contractors are paid to manage projects in sensitive harsh environments far from U.S. headquarters and they should be working closely with their on-site supervisors and security officers. If they do not heed their on-site supervisor's warnings of a dangerous employee and there is a disaster, they should not be able to abnegate responsibility.**

Large Federal Contractors are paid to manage projects in sensitive harsh environments far from home. If they refuse to heed warnings by their on-site Chief of Party supervisors in charge of security to remove an employee identified as unfit, dangerous and capable of inflicting severe injury, then they should not get a free pass when the compromised personnel does severely injure someone the Federal Contractor knows could be in his path.

US Headquarters that refuse to heed warnings from their on-site supervisor and security officer to remove an employee the supervisor has identified as unfit, dangerous and capable of inflicting severe injury should not get a free pass when the unfit employee sexually assaults a dependent child the Federal Contractor knows would be in his path.

C. **The harsh working environment in Kyrgyzstan, 70 miles north of Afghanistan, made the US expatriate community a small cloistered group giving easy access to project members and the dependent child there under the Federal Contractor's auspices and Visa responsibility. JA 323-326, see specifically JA 325 Visa.**

The harsh environment in Kyrgyzstan, 70 miles north of Afghanistan, makes the US ex patriot community a small cloistered group who have ready access to both other members of the project and their dependent children there under the Federal Contractor's representation of responsibility to VISA authorities. In this case the dependent was the Chief of Party's 11 year old solely there under the auspices of BAH, the Federal Contractor. He was housed in apartments paid for by BAH in Kazakhstan with his mother, Chief of Party, and with the Team Leader for the Kyrgyz Part of the Project. He was schooled at BAH expense in the Kazak and Kyrgyz venues of the International Schools to facilitate his staying with his mother and the BAH team leader in Bishkek. He was transported in the company car and invited to the Project's social events. He was raped in the apartment paid for by BAH for the dangerous employee. That employee did the Project Financial

Management and was responsible for communicating with BAH's financial management department during business hours in its Virginia headquarters. Petitioner would have much less discretion in how he could escape a dangerous employee kept on the project after his supervisor identified him a capable of greatly harming him.

D. **Many large companies sustain themselves as Federal Contractors managing the execution of U.S. foreign policy and wars similar to Booz Allen Hamilton. Currently many U.S. citizens work for these large Federal Contractors because jobs in the U.S. are hard to get and hard to keep. To shield the large Federal Contractor in US Headquarters from responsibility for ignoring danger warnings from supervisors in the field that come true promotes inefficiency and waste of government money.**

The on-site supervisor and security officer is the most effective way for Federal Contractor U.S. HQ to keep informed about the dangers on location in far flung foreign U.S. project sites. To excuse large Federal Contractors in US HQ from responsibility for failure to heed the on-site supervisor's information of danger is to release the Federal Contractor from performing the primary function of management for which it is paid by the U.S. government. To excuse the large Federal Contractor in Virginia from responsibility for failure to heed the information of danger from the Chief of Party supervisor and security officer who is on-site and necessarily the most informed of the danger is to release the Federal Contractor from performing the

primary function of management for which it is paid by the U.S. government.[3]

II. **The Court should grant the petition to resolve a conflict between this decision of the U.S. 4th Circuit Court and conflicting decisions from other U.S. Circuit Courts over whether sexual assault is so extraordinary and unforeseeable that victims cannot seek relief from warned employers of employees who sexually assault.**

A. **The 4th Circuit Court Baker v BAH decision conflicts with the 5th Circuit Jones decision that preserves a sexual assault victim's right to sue a company for negligent retention, supervision and hiring even above the Federal preference for arbitration over litigation, Jones v. Halliburton, 583 F.3d. 228, 107, September 15, 2009.**

The U.S. 5th Circuit decision considers sexual assault sufficiently foreseeable and unextraordinary to support the victim of sexual assault's right to sue a company for negligent retention and supervision by its employee that is greater than the Federal proclivity for favoring arbitration over litigation, Id.

The District Court in the Jones case found that claims of assault and battery; intentional infliction of emotional distress (related to the assault); negligent hiring, supervision and retention of the employees who committed the rape; and false imprisonment

[3] Although the Baker v. BAH, 358 Fed. Appx. 476, 2009, WL 5125672 C.A.4 (Md) case is not officially published by the Fourth Circuit, it is in reporters such as the Westlaw WL series with Fed Appx and WL cites. In view of Fed. R. App P 32.1, Infra, as a post 2007 case it can be cited with varying weight or no weight in the different U.S. Circuit Courts.

were not within the scope of the arbitration clause, noting that Ms. Jones could maintain them "without reference to her own employment;" while the rape might be related to the employment of the perpetrators, it was not related to the employment of the victim. Jones v. Halliburton, 625 F. Supp. 2d 339, 352 (S.D. Tex. 2008). The Fifth Circuit spoke of Ms. Jones showing for purposes of vicarious liability of KBR, "that the alleged perpetrators were acting in ways that related to their employment because, in assaulting Jones, they were violating company policies. Id.

In Jones v. Halliburton, the District Court found that claims of assault and battery; intentional infliction of emotional distress (related to the assault); negligent hiring, supervision and retention of the employees who committed the rape; and false imprisonment were not within the scope of the arbitration clause, noting that Ms. Jones could maintain them "without reference to her own employment;" while the rape might be related to the employment of the perpetrators, it was not related to the employment of the victim. Jones v. Halliburton, 625 F. Supp. 2d 339, 352 (S.D. Tex. 2008). Halliburton/KBR appealed. The Fifth Circuit affirmed.

B. The Fourth Circuit Court Decision conflicts with other U.S. Circuit Court decisions that allow employer liability for negligent retention when its employees sexually assault third parties, particularly vulnerable third parties likely to come into their path.

The duty that BAH breached was owed by BAH to any person and also a special duty to a young and

vulnerable 11 year old dependent of the Chief of Party who was in Kazakhstan and Kyrgyzstan under the auspices of the Federal Contractor and integrated into the Project milieu in both countries. The U.S. Fourth Circuit Court of Appeals failed to acknowledge the Federal law that clearly established that Sexual Assault by an employee under the circumstances is not extraordinary and unforeseeable and is definitely within the realm of employer litigation against Federal Contractors for negligent retention, supervision, and hiring even in preference to the Federal Arbitration Act's congressional declaration of a liberal federal policy favoring arbitration agreements. See also, Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983) concerning arbitration.

The trend in the United States is to make parties responsible with respect to rape and murder. The plaintiff in Nazareth v. Herndon Ambulance Service, Inc., 467 So.2d 1076, 68 ALR 4th 1 (Fla. Dist. Ct. App. 5th Dist. 1985), was sexually assaulted by an ambulance attendant while being transported to the hospital. The court found an implied contract for passage free from attack, and on that basis imposed vicarious liability on the defendant ambulance company for the acts of the attendant to whom it had delegated the plaintiff's care. A similar result was reached by the Maryland Court of Appeals in St. Michelle v. Catania, 252 Md. 647, 250 A.2d 874 (1969) a case in which the plaintiff was raped by a cab driver and another passenger. Similarly, In Doe

v. Celebrity Cruises, Inc., 394 F.3d 891, 2005 A.M.C. 214 (11th Cir. 2004), the court applied maritime law to hold a cruise line strictly liable for a crew member's sexual assault of a female passenger. In one particularly egregious case from Florida, where the perpetrator, a prominent attorney and school board member, was removing a child from school during the day, taking the boy to his law office or his home and sexually assaulting him, the court allowed negligence claims against the perpetrator's wife, who had a duty to protect a "child social guest" in her home, as well as the law firms where the perpetrator had been employed, which "had a duty to exercise reasonable care to protect [plaintiff child] from foreseeable harm" in their offices. Doe v. Faerber, 446 F. Supp. 2d 1311, 213 Ed. Law Rep. 206 (M.D. Fla 2006)]; See also Holy See v. Doe, No. 09-1 (9th Cir.,) 557 F.3d 1066; CVSG Nov. 16, 2009 up on Petition for Writ of Certiorari U.S. Supreme Court which gives an idea of the level of confusion among the Circuits in this area.

III. This Court should grant the Petition to resolve the question of standard of proof of foreign law under Federal Rules of Civil Procedure Rule 44.1.

Maryland conflicts law is lex loci delicti, where the last act of the tort was committed which is Kyrgyzstan the capitol of which is Bishkek, the staging area of our troops for the war in Afghanistan. Although Defendant originally used a Declaration opinion citing 1960's Former Soviet Union law without production of that law to assert

that a case could not be brought because Plaintiff had not prevailed in a criminal charge against the employee. A40-43. Plaintiff's subsequent production of the hard to obtain Kyrgyz SSR law the Declaration cited from the 1960's showed there was nothing prohibiting Plaintiff from filing a civil case in Kyrgyzstan. A32-40. Further, the Kyrgyz law expands the ability to sue for medical bills to children harmed under the age of 15. Further, the issue of scope of employment was in the Soviet Kyrgyz law in effect in 1996 when the rape occurred a question of fact to be determined from the circumstances. Id. An employee, such as the unfit financial manager living in an apartment paid for by BAH, where he had company equipment and received communications during Virginia HQ business hours including from the financial management department in Virginia HQ is pursuing company work. The weekend Friday night in Kyrgyzstan when the rape occurred from 8 pm to Saturday morning 4 am is the Virginia HQ work day 9am to 5 pm. when he can be called on business by Virginia HQ.

The District Court decided that Maryland lex loci delicti made Kyrgyz the applicable law for ability to sue. The District Court used Respondent representations about the Declaration A40-43 which misquoted Kyrgyz law to say the case could not be brought unless Petitioner had first obtained a criminal conviction and BAH had ordered the employee to rape the 11 year old child. A25 Considering the Respondent's incorrect representation of narrow respondent superior liability the District Court deemed the case

procedurally barred in Kyrgyz Court and therefore barred in his court.

The District Court then proceeded to rule that if he was wrong and the case was not barred then Maryland law applied for which he considered the evidence insufficient to overcome summary judgment. If he was incorrect on Maryland law then Virginia law would not fair much better, although it did recognize broader negligent retention relief. A26.

The 4th Circuit Court did not deal with the actual Kyrgyz law cited infra A32-40. Instead the Circuit Court created its own public policy which it based on a case about litigation against the builder of a house for a smoke detector that failed after the house had been bought and sold a few times. From this case the Circuit Court extrapolated the public policy that negligent retention liability for rape by an employee even when the Federal Contractor in Virginia HQ has been warned by the on-site supervisor of his battery of others and explosive emotional unfitness and likelihood of gravely harming her son or others was extraordinary and unforeseeable. The Fourth Circuit Court ruled that: "BAH could not reasonably anticipate that Davenport's behavior was an inevitable prelude to sexual assault if his actions did not clearly and unmistakably threaten particular criminal activity". A1-16. Therefore, despite the fact that the on-site supervisor in the harsh environment with the employee had warned US Virginia HQ and asked them repeatedly to remove him back to the US HQ, the Circuit Court ruled that to hold the Virginia Federal Contractor liable for negligent retention and supervision would tear asunder the foundations of proximate cause.

The Circuit Court's public policy decision would seem to be inconsistent with Maryland law. Maryland law applies lex loci delicti in a conflict of law situation where the events giving rise to a tort action occur in more than one State. Under the principle of "lex loci delicti" courts are to apply the law of the State where the injury, the last event required to constitute the tort, occurred. Under Maryland's exception to its traditional rule of "lex loci delicti", pursuant to which in tort actions courts otherwise are to apply the law of the state where the injury occurred, the law of the forum will be applied whenever the law of the place of the wrong is contrary to a strong public policy of the forum state. Erie Ins. Exchange v. Heffernan, 399 Md. 598, 925 A.2d 636, Md., 2007. June 13, 2007.

In Erie Ins. Exchange v. Heffernan, 399 Md. 598, 925 A.2d 636, Md., 2007. June 13, 2007 the Maryland Court of Appeals had before it one of the questions of law certified by the United States District Court for the District of Maryland pursuant to the Maryland Uniform Certification of Questions of Law Act (Maryland Code, §§ 12-601 through 12-613 of the Cts. & Jud. Proc. Article) which dealt with lex loci delicti. The Court of Appeals held:

> There exists a well-established exception to the traditional rule of *lex loci delicti*. 10 Under the exception, the law of the forum will be applied whenever the law of the place of the wrong is contrary to a strong public policy of the forum state. See Schmidt v. Driscoll Hotel, Inc., 82 N.W.2d 365 (Minn. 1957).... "that merely because Maryland law is dissimilar to the law of another jurisdiction does not render the latter contrary to

> Maryland public policy and thus unenforceable in our courts. Rather, for another state's law to be unenforceable, there must be 'a strong public policy against enforcement in Maryland,' or 'a public policy sufficient to require the application of law other than the law of the place of the contract,'" Bethlehem Steel Corp., 304 Md. at 189, 498 A.2d at 608 (citations omitted).

Thus, even in the Fourth Circuit jurisdiction there is great divergence in how Rule 44.1 standard of proof of law is applied. With no clear standard for application countless hours of Court time will be wasted in litigation over what law is to be applied.

This case is important because the U.S. has hundreds of thousands of US citizens working and fighting abroad and it immediately impacts their avenue to justice even when they are harmed far away from home

For these reasons, the Fourth Circuit Court of Appeal erred and the case is important.

CONCLUSION

The conflict between the U.S. Fourth Circuit Court of Appeals and the Federal law as to whether sexual assault by an employee is so extraordinary and unforeseeable that it breaks the chain of proximate cause for employer negligent retention, supervision and hiring litigation frustrates the intent of Federal law.

The conflict between the U.S. Fourth Circuit Court of Appeals and the Federal law as to whether

sexual assault by a seriously emotionally compromised employee of a Federal Contractor receiving payment for management of execution of U.S. policy and receiving notice from the local supervisor abroad of eminent danger of grave physical injury threatens an important aspect of administration and cost containment execution of U.S. foreign policy execution and military objectives. Large Federal Contractors at their U.S. Headquarters can ignore warnings from the on-site supervisors, Chief of Party and security officer of eminent danger of grave physical injury from compromised employees who have become unfit in harsh working circumstances and abnegate responsibility even when grave physical injury occurs in the form of rape sexual battery of innocent victims. In this case the innocent victim was the eleven year old dependent son of the Chief of Party who was part of the Booz Allen Hamilton party [under the BAH Visa Kazakhstan and Kyrgyzstan near Afghanistan] for the U.S. AID Bankruptcy Project.

This Court should grant the Petition and resolve the conflict between the U.S. Fourth Circuit Court of Appeals and Federal law, and conflict between Circuit Courts to provide uniformity in the treatment of warned of grave physical danger from employees which result in sexual assault and the responsibility of the U.S. Headquarters noticed by the employee's on-site supervisor, head of project and security officer in far distant harsh environment

countries executing U.S. foreign policy and military operations.

Respectfully submitted,

/s/ Kathleen Woody
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Dated: June 24, 2010

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 08-1152

MARK BAKER,
Plaintiff - Appellant,

v.

BOOZ ALLEN HAMILTON, INC.,
Defendant - Appellee.

No. 08-2321

MARK BAKER,
Plaintiff - Appellee,

v.

BOOZ ALLEN HAMILTON, INC.,
Defendant - Appellant.

Appeals from the United States District Court for the District of Maryland, at Greenbelt. Roger W. Titus, District Judge. (8:06-cv-00889-RWT)

Argued: October 28, 2009
Entered: December 28, 2009

Before MICHAEL, Circuit Judge, HAMILTON, Senior Circuit Judge, and Jane R. ROTH, Senior

Circuit Judge of the United States Court of Appeals for the Third Circuit, sitting by designation.

Affirmed by unpublished per curiam opinion.

ARGUED: Kathleen Joanna Woody, Silver Spring, Maryland, for Appellant/Cross-Appellee. Stephen William Robinson, MCGUIREWOODS, LLP, McLean, Virginia, for Appellee/Cross-Appellant. ON BRIEF: David L. Greenspan, MCGUIREWOODS, LLP, McLean, Virginia, for Appellee/Cross-Appellant.

Unpublished opinions are not binding precedent in this circuit.
PER CURIAM:

Mark Baker (Baker) brought this diversity action against Booz Allen Hamilton, Inc. (BAH), alleging several negligence claims arising from the alleged sexual assault of Baker by a BAH employee. The district court granted summary judgment in favor of BAH. Following this ruling, BAH moved for sanctions, which the district court denied. Baker appeals the district court's summary judgment ruling, and BAH cross-appeals the district court's sanctions ruling. We affirm.

I

BAH is a management consulting firm with over 19,000 employees on six continents. In 1995, BAH commenced work for the United States Agency for International Development as a contractor on its project for the development and implementation of an effective bankruptcy system in Kazakhstan and Kyrgyzstan (the Bankruptcy Project).

On or about October 1, 1995, BAH entered into a one-year contract with Baker's mother, Kathleen Woody (Woody), in which Woody agreed to provide consulting services as an independent contractor, serving as "Chief of Party" to the Bankruptcy Project. (J.A. 70).[1] As Chief of Party, Woody was responsible for supporting the development of legislation to allow bankruptcy laws to function in Kazakhstan and Kyrgyzstan. She was also responsible for supervising expatriate staff and reporting to her supervisors, who were located at BAH's offices in McLean, Virginia.

In October 1995, Woody traveled with her then-ten-year-old son to Almaty, Kazakhstan to begin working on the Bankruptcy Project. Woody's primary work station was in Almaty, where she resided with her son in an apartment, but she also made frequent trips to the Bankruptcy Project's Bishkek, Kyrgyzstan office. During these trips to Bishkek, Woody would bring her son, and the two would reside at the apartment of Vera Haugh, who worked for the Bankruptcy Project in Bishkek. On occasion, Woody's responsibilities took her away from both Kazakhstan and Kyrgyzstan, and on these occasions, Baker would stay with Haugh.

In Bishkek, Woody also had contact with another Bishkek-based BAH employee working on the Bankruptcy Project, Brian Davenport (Davenport). Davenport's primary job duties were to "deal with the non-legal, non-lawyer required aspects of performance and scope work under the [Bankruptcy

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[1] Woody's compensation package covered certain expenses for her son during his year-long stay in Kazakhstan, including his airfare to and from Kazakhstan and his school tuition.

Project's] task order." (J.A. 81). Davenport reported to Woody for "scope of work issues related to the task order itself," but generally reported to a Virginia-based BAH employee. Id.

Baker produced evidence that portrays Davenport as an angry, disgruntled, and sometimes explosive employee. For example, Dr. Igor Klyuchnikov, Deputy Chief of Party on the Bankruptcy Project, described Davenport as an "angry and sometimes physically and emotionally abusive person." (J.A. 474). He personally observed Davenport "yelling at and threatening staff, kicking furniture and throwing objects." Id. Some of the Kyrgyz nationals complained to Dr. Klyuchnikov, and he received one complaint that Davenport slapped an employee.[2]

Woody testified that, between the months of January and March 1996, she had repeated discussions with her BAH supervisors concerning Davenport's "explosive" behavior, complaining in general about Davenport's "[s]lapping, throwing, shouting, screaming, [and] yelling." (J.A. 257, 268).[3] She indicated the major catalysts for Davenport's behavior were his wife's desire to divorce him and his desire to return to work in the United States.

Davenport also on occasion got angry with Baker. For example, on a three-hour car ride from Almaty

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[2] Baker also personally observed Davenport slap an employee across the face.

[3] Haugh testified that Davenport had a "bad temper," but was not the type of person who would assault someone. (J.A. 383). Rather, "he's the type that would throw things off his desk, yell and scream, maybe stamp his feet . . . and slam doors." Id.

to Bishkek in December 1995, Baker was playing a game with the hired driver and perhaps acting a little rambunctiously. At one point, Davenport (who was sitting in the front seat with the driver) turned to Baker (who was sitting next to Woody in the backseat), pointed his finger at him, and said, raising his voice, "if I don't get my REM [(Rapid Eye Movement)] sleep I'm going to explode." (J.A. 323). Moreover, at a New Year's Eve party, about three months before the alleged sexual assault, in a threatening tone, Davenport told Baker he was going to "get" him. (J.A. 287).

On April 6, 2006, Baker brought this negligence action against BAH in the Circuit Court for Montgomery County, Maryland.[4] BAH removed the case to the United States District Court for the District of Maryland. On March 9, 2007, Baker filed an amended complaint. The amended complaint alleges that

> [i]n or about March of 1996, while performing her duties as hereinabove described in the country of Kyrgyzstan, the Plaintiff, then a minor, who was residing with his mother overseas, was raped and sodomized and threatened not to tell his mother by an employee of BOOZ ALLEN who was known or in the exercise of reasonable care should have been known to BOOZ ALLEN as a person with serious emotional disorders who had previously requested of BOOZ ALLEN that he be returned to the United States as a result of said emotional disorders.

[4] Because of Baker's age, the statute of limitations was tolled under Maryland law.

(J.A. 32-33). Although not named in the amended complaint, Davenport is the BAH employee who allegedly sexually assaulted Baker. Davenport vehemently denies the allegations, but BAH concedes for purposes of summary judgment we must assume that Davenport engaged in such conduct. According to Baker, the alleged sexual assault occurred while he was staying with Haugh at a time when Woody was away on business in Moscow. During this time, Davenport lured Baker to his own apartment in Bishkek and sexually assaulted him.[5]

Based on the allegations in the amended complaint, Baker claimed that BAH was negligent because it: (1) "[f]ailed to adequately consider the reports" that Davenport was suffering from emotional disorders which were likely to result in a sexual assault; (2) "[f]ailed to foresee" that Davenport's actions against Baker would be carried out; (3) "[f]ailed to warn" or provide notice to Woody of Davenport's emotional disorders; and (4) "[f]ailed to provide" Baker with adequate security. (J.A. 33).

On July 30, 2007, BAH filed a motion for summary judgment. On December 19, 2007, the district court held a hearing on the motion. At the conclusion of the hearing, the district court granted the motion. On January 16, 2008, BAH filed a motion for sanctions, which the district court denied on October 31, 2008. Baker filed a timely notice of

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[5] Baker did not report the sexual assault to his mother. Rather, he disclosed the sexual assault to his therapist some time in early 1997. According to Baker, he did not disclose the sexual assault to Woody because, at the time, he "didn't trust anybody." (J.A. 207).

appeal, and BAH filed a timely notice of cross-appeal.

II

Baker claims that the district court erred when it granted summary judgment in favor of BAH on his negligence claims. More specifically, he claims there are issues of fact regarding BAH's liability for the negligent hiring, retention, and supervision of Davenport.

In a diversity action, the law of the forum court governs the substantive issues and federal law governs the procedural issues. Dixon v. Edwards, 290 F.3d 699, 710 (4th Cir. 2002). Thus, Maryland's choice of law rules govern. Id.; Wells v. Liddy, 186 F.3d 505, 521 (4th Cir. 1999). Maryland applies the lex loci delicti rule in tort cases. Philip Morris, Inc. v. Angeletti, 752 A.2d 200, 230 (Md. 2000). Under that rule, when a tort occurs in another state, the substantive rights of the, 785 F.2d 503, 511 (4th Cir. 1986) (applying Maryland law). parties, even though they are domiciled in Maryland, are to be determined by the law of the state in which the alleged tort took place. Id. A tort occurs "where the injury was suffered, not where the wrongful act took place." Johnson v. Oroweat Foods Co.

Baker's alleged injuries were suffered in Kyrgyzstan, the site of the sexual assault. Thus, Kyrgyz law applies, provided the requirements of Rule 44.1 of the Federal Rules of Civil Procedure are met. See Ferrostaal, Inc. v. M/V Sea Phoenix, 447 F.3d 212, 216 (3d Cir. 2006) (noting that where a party fails to carry its burden of proving foreign law under Rule 44.1, the forum law should apply); cf. The Hoxie, 297 F. 189, 190 (4th Cir. 1924) (noting, in

pre-Rule 44.1 case, that forum law applies unless the party seeking to use foreign law establishes that foreign law differs from forum law).

Federal Rule of Civil Procedure 44.1 controls determinations of foreign law in federal court. It provides:

> A party who intends to raise an issue about a foreign country's law must give notice by a pleading or other writing. In determining foreign law, the court may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under the Federal Rules of Evidence. The court's determination must be treated as a ruling on a question of law.

Fed. R. Civ. P. 44.1. Rule 44.1 provides courts with broad authority to conduct their own independent research to determine foreign law but imposes no duty upon them to do so. See Carey v. Bahama Cruise Lines, 864 F.2d 201, 205 (1st Cir. 1988) ("[Rule] 44.1 empowers a federal court to determine foreign law on its own, but does not oblige it do so."). Thus, the party claiming foreign law applies carries both the burden of raising the issue that foreign law may apply in an action and the burden of proving foreign law to enable the district court to apply it in a particular case. Cf. Whirlpool Fin. Corp. v. Sevaux, 96 F.3d 216, 221 (7th Cir. 1996) (holding that party waived conflicts of law issue because it failed to fulfill its obligation under Rule 44.1 "to provide the district court with 'reasonable notice' of his intention to raise an issue of foreign law"). Where a party fails to satisfy either burden, the district court should

apply the forum state's law. Ferrostaal, 447 F.3d at 216.

In order to meet its burden of proving Kyrgyz law, BAH proffered the July 25, 2007 declaration of a Kyrgyz lawyer, Tatiana Ivaschenko. In her declaration, Ivaschenko stated that Baker's claims were without merit under Kyrgyz law, opining:

> [A] legal entity shall be responsible for its employee's actions or inactions, if that employee has caused harm to third parties in the course of the performance of his or her employment obligations. . . .
>
> Even if an employee were to cause harm to a third party in the course of performance by that employee of his or her employment obligations, an employer shall not be liable for its employee's actions or inactions unless the predicate act[s], which must have resulted in criminal sanctions, [were] completed upon the employer's order and control. . . .
>
> In the Kyrgyz Republic, the civil courts will not examine a claim for damages for buggery (defined as sodomy) unless the fact of buggery has been established in a criminal procedure . . . .
>
> * * *
>
> In sum, the legislation of the Kyrgyz Republic as of 1996 contains provisions, according to which, an employer is only liable for damages ca[u]sed by its employee to a third party only in the course of performance by such employee of his/her employment obligations or official duties. An employer cannot be held

> responsible for a criminal act (i.e., buggery) committed by the employee, unless the act is completed following the order of the employer and under the employer's control. Thus, Booz Allen Hamilton Inc. cannot be held liable for the facts alleged in the Amended Complaint.

(J.A. 409-10).

In its decision granting BAH's motion for summary judgment, the district court, out of an abundance of caution, held that Baker could not prevail under Kyrgyz (the locus of Baker's injuries), Maryland (the forum state), or Virginia law (where decisions concerning Davenport's employment were made). Baker claims that Maryland law should apply because BAH failed to meet its burden of proving Kyrgyz law and, therefore, Maryland law, as the forum state's law, applies. In particular, he claims that the statutes referenced in the Ivaschenko declaration are not controlling and, in any event, do not fully explain the breadth of Kyrgyz law.

We need not decide whether the district court erred in examining Baker's claims under Kyrgyz law. This is so because, even accepting Baker's invitation to apply Maryland law, Baker's negligence claims fail.

The district court rejected Baker's negligence claims under Maryland law, principally concluding that Baker failed to establish that any negligent conduct by BAH proximately caused Baker's injuries. In so concluding, the district court observed:

> I've received no information in this record that would support a conclusion that Booz Allen

> was on notice that this employee had a proclivity or a high risk of committing sexual attacks of any nature, much less violent attacks. All I do have is some incidents of obnoxious behavior--two instances of slapping someone, and bitter complaints by the plaintiff's mother to her employer that this man should be sent home.

(J.A. 543).

Under Maryland law, a plaintiff alleging a negligence claim must demonstrate "(1) that the defendant had a duty to protect the plaintiff from injury, (2) that the defendant breached that duty, (3) that the plaintiff suffered actual injury or loss, and (4) that the defendant's breach of duty proximately caused the loss or injury." Pendleton v. State, 921 A.2d 196, 204 (Md. 2007).

In the negligent hiring, retention, and supervision context, an employer has the duty to use reasonable care to select employees competent and fit for the work assigned to them and to refrain from retaining the services of an unfit employee. Henley v. Prince George's County, 503 A.2d 1333, 1341 (Md. 1986). The class of persons intended to be protected by the imposition of this duty necessarily includes those members of the public who would reasonably be expected to come in contact with the employee in his performance of his duties. Id.

Proximate cause "involves a conclusion that someone will be held legally responsible for the consequences of an act or omission." Peterson v. Underwood, 264 A.2d 851, 855 (Md. 1970). To be a proximate cause for an injury, "the negligence must be 1) a cause in fact, and 2) a legally cognizable

cause." Hartford Ins. Co. v. Manor Inn of Bethesda, Inc., 642 A.2d 219, 230 (Md. 1994) (citation and internal quotation marks omitted).

Causation-in-fact concerns the threshold inquiry of "whether defendant's conduct actually produced an injury." Peterson, 264 A.2d at 855. When two or more independent acts bring about an injury, as alleged here by Baker, causation-in-fact may be found if it is more likely than not that the defendant's conduct was a substantial factor in producing the plaintiff's injuries. Pittway Corp. v. Collins, 973 A.2d 771, 787 (Md. 2009).

Once causation-in-fact is established, the proximate cause inquiry turns to whether the defendant's negligent actions constitute a legally cognizable cause of the plaintiff's injuries. Id. This part of the causation analysis requires us to consider whether the actual harm to the plaintiff falls within a general field of danger that the defendant should have anticipated or expected. Stone v. Chicago Title Ins. of Md., 624 A.2d 496, 500 (Md. 1993). Legal causation is a policy-oriented doctrine designed to be a method for limiting liability after cause-in-fact has been established. Pittway, 973 A.2d at 787. The question of legal causation most often involves a determination of whether the injuries were a foreseeable result of the defendant's negligent conduct. Id. at 788. Other public policy considerations that may play a role in determining legal causation include the remoteness of the plaintiff's injury from the defendant's negligence and the extent to which the injury is out of proportion to the defendant's culpability. Id. Simply put, the defendant is not liable if it appears highly extraordinary and unforeseeable that the plaintiff's

injuries occurred as a result of the defendant's alleged tortious conduct. Id.

In our view, the injury in this case (sexual assault) simply was not a reasonably foreseeable injury arising from the alleged negligent hiring, retention, and/or supervision of Davenport. The injury suffered by Baker was criminal sexual assault. Baker argues that this sexual assault was a foreseeable result of Davenport's "explosive" behavior in the workplace. We disagree. Without question, Davenport's demeanor at work was offensive. Slapping fellow employees is deplorable. However, BAH reasonably can assume that an employee who has slapped fellow employees on occasion will not sexually assault the child of an independent contractor of BAH. Therefore, BAH could not reasonably anticipate that Davenport's behavior was an inevitable prelude to sexual assault if his actions did not clearly and unmistakably threaten particular criminal activity that would have put a reasonable employer on notice of an imminent risk of harm to a victim. Slapping a fellow employee simply does not inexorably lead to criminal sexual assault.

It does not follow that every time an employee slaps another employee the employer has to fire the aggressor out of fear that the employee might rape another employee or person. But this is exactly what Baker is seeking this court to hold. Such a holding would undoubtedly tear the concept of proximate cause from its moorings. Accordingly, the district court did not err when it concluded that Baker's negligence claims failed under Maryland law.

III

BAH appeals the district court's denial of its motion for sanctions. BAH sought sanctions under Rule 11 of the Federal Rules of Civil Procedure and 28 U.S.C. § 1927. BAH claims that sanctions were appropriate because: (1) Baker did not conduct an adequate pre-filing investigation; and (2) Baker refused to abandon his negligence claims after it was clear he had no chance of success. We review the district court's grant or denial of a motion for sanctions for an abuse of discretion. Chaudhry v. Gallerizzo, 174 F.3d 394, 410 (4th Cir. 1999).

Under Rule 11, "a complaint containing allegations unsupported by any information obtained prior to filing, or allegations based on information which minimal factual inquiry would disprove, will subject the author to [Rule 11] sanctions." In re Kunstler, 914 F.2d 505, 516 (4th Cir. 1990). Moreover, Rule 11 empowers the district court to sanction a party or lawyer for insisting on a position after it is no longer tenable. Morris v. Wachovia Securities, Inc., 448 F.3d 268, 279 (4th Cir. 2006).

Section 1927 provides in relevant part:

> Any attorney . . . who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct.

28 U.S.C. § 1927. The Supreme Court has recognized that § 1927 "does not distinguish between winners and losers, or between plaintiffs and defendants." Roadway Express, Inc. v. Piper, 447 U.S. 752, 762

(1980). Moreover, "[t]he statute is indifferent to the equities of a dispute and to the values advanced by the substantive law." Id. Instead, the statute is "concerned only with limiting the abuse of court processes." Id. For this reason, a court considering the propriety of a § 1927 award must focus "on the conduct of the litigation and not on its merits." DeBauche v. Trani, 191 F.3d 499, 511 (4th Cir. 1999).

BAH claims that Baker falsely alleged in his complaint that: (1) Davenport had serious emotional disorders; (2) Davenport had previously requested that he be returned to the United States as a result of the disorders; (3) BAH failed to consider reports of Davenport's disorders; and (4) the sexual assault was caused by Davenport's disorders. BAH also claims that the frivolous nature of Baker's claims became all the more apparent following Baker's deposition. Finally, BAH takes issue with the manner in which Woody handled certain aspects of the case.

In this case, the district court did not abuse its discretion in denying BAH's motion for sanctions. Baker presented evidence that Davenport was far from a model employee, one capable of committing deplorable acts, including slapping employees. Given his propensity for slapping employees and committing other unruly acts in the workplace, it was not objectively unreasonable for Baker to claim that Davenport suffered from emotional disorders and that said disorders proximately caused the sexual assault of Baker. Finally, we have reviewed Woody's conduct and conclude that the district court acted well within its discretion when it decided to

decline to sanction her either under Rule 11 or § 1927.

IV

For the reasons stated herein, the judgment of the district court is affirmed.

AFFIRMED

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

MARK BAKER,
Plaintiff

v.

BOOZ ALLEN HAMILTON, INC.,
Defendant

Case number: RWT 06cv889

Entered December 19. 2007

ORDER

Upon consideration of Defendant's Motion for Summary Judgment [Paper No. 56], Defendant's Motion to Strike the Affidavits of Leo Surla, Irina Zipman, and Igor K. Klyuchnikov [Paper No. 79], the oppositions and replies thereto, and the arguments of counsel presented at the hearing conducted before the undersigned today, for the reasons stated on the record, it is this 19th day of December, 2007, by the United States District Court for the District of Maryland,

ORDERED, that Defendant's Motion to Strike the Affidavits of Leo Surla, Irina Zipman, and Igor K. Klyuchnikov [Paper No. 79] is GRANTED IN PART and DENIED IN PART; and it is further

ORDERED, that Defendant's Motion for Summary Judgment [Paper No. 56] is

GRANTED; and it is further

ORDERED, that judgment for costs be entered in favor of Defendant; and it is further

ORDERED, that the Clerk of the Court **CLOSE THE CASE**..

/s/

ROGER W. TITUS
UNITED STATES DISTRICT JUDGE

Entered: January 25, 2010

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 08-1152(L)
(8:06-cv-00889-RWT)

MARK BAKER,
Plaintiff - Appellant,

v.

BOOZ ALLEN HAMILTON, INC.,
Defendant - Appellee.

No. 08-2321
(8:06-CV-00889-RWT)

MARK BAKER,
Plaintiff - Appellee,

v.

BOOZ ALLEN HAMILTON, INC.,
Defendant - Appellant.

ORDER

The Court denies the petition for rehearing and rehearing en banc. No judge requested a poll under Fed. R. App. P. 35 on the petition for rehearing en banc.

Entered at the direction of the panel: Judge Michael, Senior Judge Hamilton and Senior Judge Roth.

For the Court
/s/ Patricia S. Connor, Clerk

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT COURT
OF MARYLAND,

Mark Baker,
Plaintiff,

v.

Booz Allen Hamilton, Inc.,
Defendant,

Civil Action: RWT-06-0889.

Wednesday, December 19, 2007,
Greenbelt, Maryland.
Excerpts of Transcript of Motions Hearing
Before the Honorable Roger W. Titus

JA 110

MR ROBINSON: The first issue the court, I believe, has to look at is the choice of law. We have provided an affidavit from a lawyer in Kyrgyzstan that indicates that there are clearly a number of procedures and steps that have to be followed under Kyrgyz law in order for this claim to be cognizable.

THE COURT: Let me ask you one thing, and perhaps it's a question of omission, or maybe it's otherwise. I've reviewed the affidavit of the lawyer, and it's a civil law state or country, and everything is going to be written in these codes. There was no addressing in that affidavit any basis for liability under a theory of negligent hiring or supervision, only that one would have respondeat superior-type

liability under certain circumstances that were limited by that opinion.

Is the absence of any discussion of that an oversight? Or is there simply no basis under Kyrgyzstan law for imputing liability to an employer for negligent hiring or supervision?

MR. ROBINSON: It's the latter, Your Honor. To the extent that there is any potential liability, as I appreciate Kyrgyz law, it is solely under the respondeat superior theory that was contained in the affidavit.

THE COURT: If you don't have respondeat superior circumstances, you don't have liability under

MR. ROBINSON: That's correct, Your Honor. Yes, sir. See JA 110-111.

JA 118

MR. WOODY: In relation to the duty that was owed to Mark. A special relationship did occur between Mark Baker and Booz Allen, because under the contract that his mother, Ms. Woody, had with Booz Allen, Booz Allen was to pay for the housing, the education, the nanny, the transportation, and medical costs of the child and also of the adult. Mark was in Kazakhstan on a special visa of Booz Allen, not on his own visa. He was there on his own special visa from Booz Allen which Booz Allen had the right to withdraw at any time, again indicating a special relationship. He would not have been allowed in the country except for that special visa that he has.

All of these matters were a matter of contract between Ms. Woody and Booz Allen, creating a special relationship. Booz Allen was well aware that

Mark would be around Davenport during this entire task period. He was at the office with his mother, he was—they traveled together. The attended functions together, and all of them were part of a small Booz Allen family in Kyrgyzstan and Kazakhstan. It was well understood that these parties would all be thrown together.

Incidentally, Booz Allen also paid for the residence of Davenport. Because there was an 11-hour difference between the Virginia time and Kazakhstan time, both Ms. Woody and Mr. Davenport had to be available in the evenings, and Booz Allen paid for those residences of each, Ms. Woody and Mr. Davenport. As a matter of fact, Mr. Davenport, at one time, made a comment during his deposition how one time he was awakened in his sleep in the middle of the night at 3 o'clock in the morning he bumped his head because Virginia had called him at that time, and they called often at that time, as Ms. Woody had to call often at this time. JA 118-120.

MR WOODY: First of all, we would like to point out the type of relationship that Ms. Woody had with Mr. Davenport. It was that of a superior and a subordinate. Okay? There is another aspect of this thing, too. It involves a chain of command, Your Honor. There was a chain of command where Kate was the chief of the party in Kazakhstan, a remote and very dangerous country, and he was a subordinate. She was the captain for all intents and purposes – the colonel. The generals were in Virginia, okay? It was the responsibility of the captain of that project to advise Booz Allen, her superiors, of the difficulty that she was having with an employee, and these are not slight difficulties.

These are difficulties that involve violence, temper, and throwing items. He had a disposition towards that that she warned them about constantly.

Now in the case of Segerman, it points out that if you have a general disposition that an activity that a person took, even though it was not, as you said, described of a sexual nature, it provided a—it described a violent type of action, and who other than Kate, the captain that was on site at the time and was in a position to advise Booz Allen that there were any difficulties with her under-employee.

As a matter of fact, it was admitted at one of the depositions that Norman Kirsch, that, oh, we just took that as office gossip. I'm sorry, Your Honor but it's not office gossip when your field captain tells the colonel at the home office that this person has a propensity towards anger violence, and is becoming and is acting unstable and wants to go home and has difficulties with his divorce and basically she feels uncomfortable, and she feels that not only herself but others are in danger.

As far as the foreseeability is concerned that he would commit this exact. I think it's clear that in Segerman it says that you don't have to have anticipated the foreseeable and exact act, just the general field. The general field of violence, of temper, of insubordination, of unhappiness. These were the types of things that she was reporting and she should have been reporting to Booz Allen at the home office, and there were required, and they needed to give great weight to this which they apparently gave none.

THE COURT: In this case, there is no dispute that any injury that allegedly was suffered by the plaintiff was in Kyrgyzstan. Therefore, applying the choice of law rules of the state of Maryland, I should look to the laws of Kyrgyzstan, at least initially, and ascertain the law of that jurisdiction to the extent that I can. JA164

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[Through the Defendant] I've had an affidavit offered to me from an attorney named Tatiana Ivashchenko.... She Indicates that a legal entity is responsible for its employee's actions or inactions if that employee has caused harm to third parties in the course of the performance of his or her employment obligations but notes that even if an employee were to cause harm to a third party in the course of the performance by that employee of his or her employment obligations, and employer shall not be liable for its employee's actions or Inactions, unless the predicate act, [rape], which must have resulted in criminal sanctions, were completed on the employer's order and control. JA 165

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I have been advised by counsel at argument today that the Kyrgyzstan was asked to advise about the law of employer hability for torts that harm third persons and that this was the answer given and that there was no explication of an alternative basis of hability such as is recognized in some jurisdictions for negligent hiring, supervision or retention. It would appear that the Kyrgyzstan law has a relatively narrow scope of employer liability for actions such as the nature alleged in this case. I have no reason to dispute that, and it seems to me

that the law of Kyrgyzstan would not permit liability to be imposed upon Booz Allen under the circumstances of this case.....JA 165-6

I will not, however, rest any decision on such a simply relying solely upon Kyrgyzstan law, and I will address the question of whether or not there is a possible basis for liability under either Maryland law or under Virginia law...JA166

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Therefore, I conclude that if I were to apply Maryland law, which I conclude I do not need to apply but alternatively will apply to the extent that my analysis of the Kyrgyzstan law issue Is incorrect, I conclude that the plaintiff has failed to meet his burden of show that the defendant knew or should have known that the defendant was potentially dangerous. "Dangerous" meaning a danger of committing a sexual or other violent assault." JA172

Finally, to the extent that my analysis of Kyrgyzstan and Maryland law is incorrect, in Virginia, the plaintiff does not fair any better. JA 172-3

Virginia does recognize a separate claim for negligent retention in which an employer may be liable where it knew or should have known the employee was dangerous and likely to harm others.....JA173.

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Therefore, I will enter an order for the reasons that I have just stated on the record which grants the defendant's motion for summary judgment... JA 175

Excerpt from Davenport Self-Assessment for BAH February 25, 1996 JA 492-3

3. Describe your...disappointments:

Inability of firm to field sufficient number of individuals in related areas of expertise on tasks, leading to the reliance on under qualified and inexperienced special consultants and subcontractors, unwillingness of firm to support employees with appropriate experience in contentious technical, contractual, and budgetary discussions with the above individuals.

5. Degree of Progress Against Law Year's Development Needs: Some

Evidence: One of the major goals of the past year was to gain more knowledge about the inner-workings of the firm and of consulting practices in general. This has not occurred as our practice has been forced to push people out into the field to keep billability high. This tactic has the down-side of often sacrificing individual career development.

7. Feelings About Your Job: What are your frustrations and motivations?

My main frustration at this point is that, rather than feeling like a "valuable employee," I rather feel like a "pin point" on a large map. A "pin point" that can be occasionally pointed to from time to time, and then moved with little regard. Otherwise, it just sits there and is ignored...

Excerpt from Davenport Self-Assessment for BAH March 3, 1995 JA 486-8

Accomplishments: Successful management of AED training program despite logistical and administrative complication; ability to assume field assignment on short notice and then remain longer than anticipated due to changing circumstances, successful transition from academic to professional consulting environment.

Disappointments: Lack of direction on certain corporate procedures and administrative requirements from colleagues; inability of firm to field sufficient number of individuals in related areas of expertise on tasks mitigating against interaction with and reliance upon uncooperative subcontractors.

4. Goals: My goal for the next year is to complete at least one longer term field assignment and then return to the Program Office [in Virginia] to craft or manage a task of my own design, preferably in Russia and in the area of Defense Conversion or Military Assistance.

5. Degree of Progress Against Last Year's Development Needs Substantial. I feel that few individuals sharing the academic background that I have are able to make the transition to the more immediate "task oriented" environment that characterizes the consulting world.

6. Career Development Strategy: for the next year

Priority 1: Firm Knowledge

Attend Booz Allen's Business Processes Date Expected-Upon Return Stateside

Priority 2: Teamwork

Attend Interpersonal and Team Effectiveness Date Expected – Upon Return Stateside.

Priority 3: Technical Knowledge

Work with PCS on financial aspects of follow Kazak/Kyrgyz follow on tasks Current to June 2005

Priority 4: Client Relations

Interface with local [US] AID mission as much as possible and interact with AID-Washington based staff when in the field. Date Expected Current to June 2005.

7. Feelings About Your Job: I am motivated by the fact that in this program, we are actually "doing something" active in the Soviet Union....What I am frustrated by, however, are the complicated caused by the nature of the work-being "flexible" to changes and delays and then being ready to go in an instant to a long-term overseas assignment can be a logistical nightmare. We are beginning to address these issues in some of the procedures that we are instituting, but I believe that we need some sort of "safety net, to address the personal difficulties that arise from our professional work. These feelings remain once deployed into the field, although it is evident that our Program off is learning although somewhat too slowly to suite some tastes, to institute standard policies to mitigate both against

the above, as well as through difficulties encountered once deployed.

PERFORMANCE APPRAISAL BY NORM KIRSCH in McClean Virginia JA 451-455

EVIDENCE/COMMENTS/DEVELOPMENT NEEDS:

[Brian] has demonstrated his ability to ...accomplish...work plan activities in a challenging and harsh overseas environment. JA 454

PERFORMANCE APPRAISAL BY NORM KIRSCH in March 1996 McLean VA, JA 496-500.

Development Needs:

...Brian needs to further develop his interpersonal and group-support and coordination activities...

Summary Comments:

Brian's energetic drive to solve problems and **maintain control** are commendable but he needs to gain a better understanding of superior-subordinate authority and support responsibilities....

VI. Brian...has...a poor working relationship with his Chief-of-Party supervisor on the current Bankruptcy Law Task.

VI. Brian...[functions]...in a technically complex and challenging work environment...

VII. Brian spent the majority of this rating period (10 months) o overseas assignment in the NIS [former Soviet Union] and was unable to participate in the Bah Internal training courses [Virginia] courses recommended in last year's development needs 'strategy for the coming year.' It is anticipated that Brian's return to the home office in the next

year will be sufficient in duration to allow for his attendance in these same courses.

Flexibility and Adaptability – Needs Improvement

CIVIL CODE OF THE KIRGHIZ SSR Frunze[1] 1964 LAW OF THE KIRGHIZ SOVIET SOCIALIST REPUBLIC CONCERNING RATIFICATION OF THE CIVIL CODE OF THE KIRGHIZ SOVIET SOCIALIST REPUBLIC July 30, 1964 Frunze

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CHAPTER 41 OBLIGATIONS ARISING AS A CONSEQUENCE OF CAUSING HARM

Article 454 General basis for liability for harm caused

Harm caused to the person or property of a citizen or harm caused to an organization shall be made good in full measure by the person causing the harm.... Translated by Paul W. Merriam, American Translator's Association Certified Translator, Russian to English August 4, 2008

Article 455 Responsibility of an organization for harm caused through the fault of its workers

An organization must compensate harm which is caused through the fault of its workers during the fulfillment by them of their work (service) responsibilities.

Article 464 Responsibility for harm caused by a source of increased danger

Organizations and citizens, whose activity cause increased danger to others are obligated to compensate harm which is caused by the source of

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[1] Frunze, is now called Bishkek. It was the capital of the Kyrgyz Soviet Socialist Republic (Kyrgyz SSR) of the Former Soviet Union (Union of Soviet Socialist Union [USSR]). It is the capital of the troubled post USSR Kyrgyz Republic 70 miles north of Afghanistan.

increased danger Article 465 Responsibility for Harm Jointly Caused by Several Persons

Persons, who have caused harm jointly bear joint and several liability for the losses (casualties).

Article 475. Compensation for Harm to the Health of a Citizen Who Has Not Reached 15 Years of Age

In the case of damage to a citizen's health who has not reached fifteen years of age and who has no income, the organization or citizen who is responsible for the harm is obligated to compensate expenses connected with the harm to the victim's health.

CRIMINAL CODE OF THE KYRGYZ REPUBLIC (as of March 1994) City of Frunze, December 29, 1960

Article 112. Pederasty (Sodomy)

Pederasty (Sodomy) is punished by imprisonment for a period up to two years.

Pederacty committed using violence or in relation to a minor or where the victim is a dependent is punished by imprisonment for a period of from two to six years.

CIVIL PROCEDURAL CODE OF THE KYRGYZ REPUBLIC Dec. 29, 1999, Number 147, Bishkek [formerly Frunze]

Article 65 Basis for Releasing the Need for Further Proof

1. Facts recognized by the Court as well known are not required to be proved.

2. A Court is required to adopt decisions by a court in an earlier civil case, they are not to be

argued again and they are not subject to challenge during the litigation of the later civil action in which the same people are parties.

3. A Court trying a case about the civil and legal consequences of the actions of a person sentenced by a court in a criminal case must accept the criminal verdict as proof that the illegal actions causing a criminal conviction were committed by the defendant.

4. A Civil Court must accept the findings by a Court of Arbitration that are relevant to a civil case that are before the civil Court and the issues decided in the Court of Arbitration's findings are not to be revisited in the civil case.

CODE OF CRIMINAL PROCEDURE OF THE KYRGYZ REPUBLIC June 30, 1999
SECTION VI OTHER PROVISIONS

Chapter 16 The Civil Suit in the Criminal Matter

Article 135. Filing of a Civil Action

1. A person who has suffered harm from a crime or an act by an insane person which is forbidden by the Criminal Code of the Kyrgyz Republic, or his representative has a right to bring a civil case at the same time as the criminal case but not after the beginning of the legal hearing.

2. The civil action may be filed in both written and in oral form. An oral declaration will be entered into the trial record

3. A PERSON WHO HAS NOT FILED A CIVIL ACTION DURING A CRIMINAL PROCESS, BUT HAS NOT HAD THE ACTION EXAMINED BY A COURT, HAS THE RIGHT TO FILE A CIVIL CASE. [emphasis]

4. The public prosecutor has the right to file a civil suit in a criminal case when it is deemed by the prosecutor to be necessary to protect the rights of citizens, state interests or public interests.

Translated by Roy Cochran. American Translator's Association qualified translator from Russian into English. July 1, 2008.

See Petitioner Appendix to 08-1152 Reply Brief pp 30-38

LETTER FROM LIBRARY OF CONGRESS
101 Independence Avenue, S.E.
Washington, D.C.20540-3220
LAW LIBRARY-DIRECTORATE OF LEGAL RESEARCH-EASTERN LAW DIVISION,
(202) 707 5085, (202) 707 1820 (FAX)
July 25, 2008 LL File No. 2008-01361

Dear Ms. Woody:

In response to your request of July 23, 2008, concerning selected provisions of Kyrgyz legislation, please find attached photocopies of the provisions in question.

The attached provisions of major Codes were adopted as acts of the Kyrgyz Soviet Socialist Republic in the early 1960's, and remained in force until they were substituted by new laws of the Kyrgyz Republic in the late 1990's. All of these documents were officially published as separate Codes (with included amendments) by the Yurizdat

[YI], the then government printing office for legal materials in Russian, which remains the official language in Kyrgyzstan. The documents we are supplying you are in the same form as they were in effect in 1936.

If you have further questions concerning this issue, please call me at (022) 707-9861 or email me at prou@loc.gov. We hope this information is helpful.

Sincerely,

/s/, Peter Roudik,
Assistant Director of Legal Research,
Chief Eastern Law Division.

Attachment
Ms. Kate Woody address redacted
katewoody@comcast.net

The Law Library of Congress is the foreign legal research arm of the United State Congress. You may contact us at (800) 550-0442 (fax) or law@loc.gov (email. We also invite you to visit our website: http://www.loc.gov/law.

See Petitioner App to 08-1152 Reply Brief pg 39

1936 CONSTITUTION OF THE USSR
Adopted December 1936
CHAPTER I
THE ORGANIZATION OF SOVIET SOCIETY

Article 1. The Union of Soviet Socialist Republics is a socialist state of workers and peasants.

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CHAPTER II
THE ORGANIZATION OF THE SOVIET STATE

Article 13. The Union of Soviet Socialist Republics is a federal state, formed on the basis of the voluntary association of Soviet Socialist Republics [15 in number] having equal rights, namely:

The Russian Soviet Federated Socialist Republic

*****

The Kazakh Soviet Socialist Republic
The Kirghiz Soviet Socialist Republic

*****

Article 14. The jurisdiction of the Union of Soviet Socialist Republics, as represented by its highest organs of state authority and organs of government covers:

a. Representation of the Union in international relations, conclusion and ratification of treaties with other states;

*****

u. Legislation on the judicial system and judicial procedure; criminal and civil codes; [emphasis]

*****

Article 15. The sovereignty of the Union Republics is limited only within the provisions set forth in Article 14 of the Constitution of the U.S.S.R. Outside of these provisions, each Union Republic exercises state authority independently. ....

Article 16. Each Union Republic has its own Constitution, which takes account of the specific

features of the Republic and is drawn up in full conformity with the Constitution of the U.S.S.R.

*****

Article 19 The laws of the U.S.S.R. have the same force within the territory of every Union Republic.

Article 20. In the event of a discrepancy between a law of a Union Republic and an all-Union law [of the USSR], the all-Union law prevails.

See Petitioner Response Brief to Respondent's Appeal for Sanction 08-1152L (082321) Addendum. pp 68-71

ATTACHMENT TO PETITIONER APPELATE BRIEF 08-1152 LEARNED TREATISE

An Examination of the Modern Soviet Law of Torts, 5 Tul. L. Rev. 3 (1979) Christopher Osakwe, [note: presently Professor of Law at Moscow University]...this study attempts to bring together in one comprehensive piece Soviet statutory law, case law, and doctrine dealing with all aspects of the contemporary Soviet law of torts. It is hoped that as such a synoptic and analytical update of the modern Soviet law of torts will make it relatively easier for the comparative lawyer to glean the present status of the Soviet law of torts from one source. [see Att at page 1]

FN 13 Para 2. The general provisions of the U.S.S.R. F.P. [Fundamental Principles] Civil Legislation. Have been reenacted in the 1964 R.S.F.S.R. Civil Code as well as in the civil codes of the other fourteen Soviet Union republics [including the Kyrgyz SSR]. Purely for the sake of convenience, all civil code references in this study shall be made to the 1964 R.S.F.S.R. Civil Code [Russia]. [Note: the

RSFSR Civil Code has essentially the same provisions as the KSSR Civil Code but 10 sections lower than Kyrgyz Statutes named in the case sub judice]

Vicarious Tort Liability [see 7-8]

The doctrine of vicarious tort liability of fictitious persons under Soviet law was explained as: a juridical person is a collective social entity...The actions of a juridical person are manifested through the actions of its directors, as well as those of its employees... Accordingly, harm caused by the conduct of such individuals is considered to be the harm of the juridical person itself. In order to establish the liability of a juridical person under article 444 of the Civil Code [Article 454 of the KSSR Civil Code],,,,it is necessary to show that the resultant harm is causally connected with the unlawful conduct of its employee acting with fault.... *See*, Att pg 7

*****

A composite picture of the modern Soviet law of vicarious tort liability emerges. First, the employer is vicariously liable for the tort (based on intent, negligence, or strict liability) committed by its employee in the scope of his employment. Second, the employer, for purposes of vicarious tort liability, may be a physical or juridical person. Third, the determination of what constitutes "acting in the scope of employment" must be made on a case by case basis. In making its determination, the fact finder must consider the nature of the business, the accepted custom among those who engage in such business, and any other relevant factors... Fourth, if it is determined that the employee had abandoned

the master's business when the tort occurred, the master may still be held liable if it is shown that the employer was negligent in the selection of the employee or that the employee violated a non-delegable duty. Fifth, any tort committed by an employee on the premises of the employer's business or at any other place where the employee customarily works is presumed to have been committed within the scope of the employment, and consequently, the employer is vicariously liable....

See, Attachment to Petitioner Appellant Brief at pg 8

Petitioner's Correlation Table RSFSR and KyrgyzSSR RSFSR Civil Code 1964 KyrgyzSSR Civil Code 1964
Articles 444-471
Articles 454-481

See Page 59 of Addendum to Petitioner Appellate Brief 08-1152 August 2008.

DECLARATION OF TATIANA IVASCHENKO [Note a review of the actual laws cited in this Declaration produced supra in this Appendix shows the Declarations are not true]

COMES NOW, Tatiana Ivaschenko, who, pursuant to 28 U.S.C. Section 1746 declares under penalty of perjury under the laws of the United States of America that the foregoing is true and correct:

1. I am over the age of eighteen (18) and have personal knowledge of the statements contained in this Declaration.

2 I am a practicing attorney in Bishkek, Kyrgyzstan with the law firm of Veritas Law Agency, LLC I have been in practice since 1996.

3. I have never been disciplined or disbarred from the practice of law during my professional career.

4. I have reviewed the Amended Complaint in the above-captioned case. I have no knowledge regarding the factual allegations beyond the Amended Complaint and make the following statements with respect to the application of the law of the Kyrgyz Republic to the claims set forth in the Amended Complaint.

5. The Kyrgyz Republic is a civil law country. It law is written in the form of statutes or subordinate legislation. There is no system of reliance on case precedent.

6. The legal consequences of the conduct alleged by Plaintiff are regulated by the labor, civil, and criminal legislation as well as by the criminal procedure norms n force in the Kyrgyz Republic in 1995, 1996 (with respect to the substantive norms) and 2007 (with respect to the procedural norms.)

7. According to the civil legislation of the Kyrgyz Republic in 1996, a legal entity shall be responsible for its employee's action or inactions, if that employee has caused harm to third parties in the course of performance of his or her employment obligations. See **Art. 455, Civ. Code of the Kyrgyz SSR (1996), constituted by the Law of the Kyrgyz SSR #351-YI (dated, July 30, 1964)**, expired pursuant to the Law of the Kyrgyz Rep. #2 (dated Jan. 5 1998).

8. Even if an employee were to cause harm to a third party in the course of performance by that employee of his or her employment obligations, an employer shall not be liable for its employee's actions or inactions unless the predicate act, which must have resulted in criminal sanctions, was completed upon the employer's order and control. See **Art. 455. Civ Code of the Kyrgyz SSR (1996), constituted by the Law of the Kyrgyz SSR #351-YI (dated July 30, 1964)**, expired pursuant to the Law of the Kyrgyz Rep. #2 (dated, Jan 5, 1998).

9. In the Kyrgyz Republic, the civil courts will not examine a claim for damages for buggery (defined as sodomy) unless the fact of buggery has been established in a criminal procedure by means of: (a ruling of an investigator; and (ii) a court sentence. See Art. 112, Criminal Code of the Kyrgyz SSR (1996), constituted by the Law of the Kyrgyz SSR (dated December 29, 1960), expired pursuant to the Law of the Kyrgyz Rep. #69 (dated, Oct 1, 1997); see also **Art. 135 Criminal Procedure Code of the Kyrgyz Rep. (dated June 30, 1999)**; **Clause 3, Art. 65, Civil Procedure Code of the Kyrgyz Republic #146** [Note this should be #147](dated, Dec. 29, 1999).

10. The allegations of the Amended Complaint do not indicate that buggery has been established by the required criminal procedures identified in Paragraph 9.

11. In sum, the legislation of the Kyrgyz Republic as of 1996 contains provisions, according to which, an employer is only liable for damages caused by its employee to a third part only in the course of performance by such employee of his/her employment obligations or official duties. An

employer cannot be held responsible for a criminal act (i.e., buggery) committed by the employee, unless the act is completed following the order of the employer and under the employer's control. Thus, Booz Allen Hamilton Inc. cannot be held liable for the facts alleged in the Amended Complaint.

AND FURTHER, THIS DECLARANT SAYETH NOT. I DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE UNITED STATES OF AMERICA THAT THE FOREGOING IS TRUE AND/CORRECT. EXECUTED ON THIS 25TH DAY OF JULY 2007. /s/Tatiana Ivaschenko JA 408-410